

1 ARIZONA VOICE FOR CRIME VICTIMS,  
2 Michael G. Bailey (State Bar # 013747)  
3 Colleen Clase (State Bar # 029360)  
4 111 E. Taylor Street  
5 Phoenix, AZ. 85004  
6 480-600-2661  
7 cclase@voiceforvictims.org  
8 colleen.avcv@gmail.com  
9

10 **IN THE ARIZONA SUPREME COURT**

11 IN THE MATTER OF:

R-21-0022

12 PETITION TO AMEND RULES 4.2,  
13 6.1, 6.5, 6.6, 7.2, and 7.4, ARIZONA  
14 RULES OF CRIMINAL PROCEDURE

COMMENT OF ARIZONA VOICE  
FOR CRIME VICTIMS

15  
16 Pursuant to Rule 28(a) of the Rules of the Arizona Supreme Court, Arizona  
17 Voice for Crime Victims (AVCV) respectfully submits this Comment in  
18 opposition to the above-captioned Petition. Arizona Voice for Crime Victims  
19 (AVCV), founded in 1996, is a non-profit organization located in Phoenix, Arizona  
20 that provides pro bono legal representation and social services to victims of crime  
21 in state and federal criminal proceedings. AVCV seeks to foster a fair and  
22 compassionate justice system in which all crime victims are informed of their  
23 rights under the Arizona Victims' Bill of Rights (VBR), fully understand their  
24  
25

1 rights, and have a meaningful way to participate and assert these constitutional  
2 guarantees throughout the criminal justice process. To achieve these goals, AVCV  
3 empowers victims of crime through legal advocacy and social services. Another  
4 key part of AVCV’s mission is to provide information and policy insights in an  
5 effort to ensure victims’ rights are upheld during the practical day-to-day  
6 application of victims’ rights in Arizona’s courtrooms.  
7

## 8 **I. CRIMINAL JUSTICE REFORM AND THE TASK FORCE**

9  
10 Bail systems like ours, common and constitutional, have long been the target  
11 of criminal justice reformers. Though reform organizations have been engaged for  
12 decades,<sup>1</sup> the reform movement, as a whole, got a shot in the arm in 2015 when  
13 reform groups at both ends of the political spectrum formally joined together in  
14 what they called “the largest national effort focused on the strained prison and  
15 justice system.”<sup>2</sup>  
16

17  
18 It was in the shadow of a revitalized criminal justice reform movement that  
19 this Court, in 2016, established its Task Force on Fair Justice for All (“Task  
20 Force”), and directed the Task Force to, among other things, recommend “practices  
21 for making release decisions that protect the public but do not keep people in jail  
22

---

23  
24  
25 <sup>1</sup> The “Pretrial Justice Institute,” for example, has been fighting bail since 1976. Doubtless many other long-lived bail reform organizations are active in the broader criminal justice reform movement.

<sup>2</sup> *Unlikely Cause Unites the Left and the Right: Justice Reform*, New York Times, Feb. 15, 2015.

1 solely for the inability to pay bail.” The Task Force issued its report on August 5,  
2 2016.

3  
4 The Task Force concluded, in a section entitled “Eliminate Money for  
5 Freedom,” that “affordability” was a grave concern in pretrial release matters, and  
6 that Arizona’s constitutional and statutory bail framework amounted to bad public  
7 policy. “From a public policy perspective, [a traditional money bail system like  
8 Arizona’s] flies in the face of good government...” (p. 32, “Justice for All”). The  
9 Task Force approvingly cited the American Bar Association’s recommendation  
10 that financial pretrial release conditions should be imposed only as a last resort.  
11

12 But the Task Force also recognized that neither it nor a lawyer trade  
13 organization is the authoritative promulgator of substantive criminal justice policy  
14 in Arizona. The Task Force conceded that its key findings and recommendations  
15 were at odds with Arizona’s duly established criminal justice policy, and that real  
16 change would require legislative action or constitutional amendment. (“The task  
17 force concludes that a constitutional change should be referred by the legislature to  
18 the people to determine *whether money surety can be eliminated from our system*  
19 *altogether* and high-risk individuals can be kept in jail without the use of high-  
20 money bonds.” [p.31, “Justice for All”])(emphasis added).  
21  
22  
23

24 / / /

## II. SEPARATION OF POWERS

Notwithstanding the Task Force’s recognition that “eliminating money for freedom” would require substantive constitutional amendments and statutory changes, the courts have, through the Administrative Office of the Courts (“AOC”), taken steps to implement through procedural rules the Task Force’s recommendation, the so-called “good government” policy that eliminates the use of cash or surety in pretrial release. Because the policy urged by the Task Force is at odds with Arizona’s policy, its imposition by rule offends the separation of powers.

It is the public policy of the State of Arizona that money bail is an appropriate and often necessary condition for the pretrial release of criminal defendants. The Arizona Constitution provides that individuals charged with ordinary offenses “shall be bailable by sufficient sureties.” AZ. CONST. art. 2, § 22. The constitution likewise clarifies that the public policy interests at play in pretrial release go well beyond the simple efficient procedural administration of justice, and include other considerations such as “protecting against the intimidation of witnesses,” and “protecting the safety of the victim, any other person or the community.”

The right to establish the policies to implement the constitutional principles is granted to the legislature, which has “plenary power to deal with any topic

1 unless otherwise restrained by the Constitution.” *Seisinger v. Siebel*, 220 Ariz. 85,  
2 92, 203 P.3d 483 (2009). Conversely, the Arizona Constitution grants the  
3 Supreme Court power to make procedural rules for the courts’ operations. AZ.  
4 CONST. art. 6, § 5 (5).

6 The separation of powers doctrine “does not require a ‘hermetic sealing off’  
7 of the branches of government,” and allows for “some overlap” among the  
8 branches. *State v. Gilfillan*, 196 Ariz. 396, 403, 998 P.2d 1069 (2000)(internal  
9 citations omitted). But, when a procedural rule and a statute are in conflict, a  
10 determination must be made as to whether the conflict arises from substantive or  
11 procedural concerns. *Seisinger*, 220 Ariz. 85. If substantive, the statute must  
12 prevail. *id.*

15 Here, the subject of regulation, bail and pretrial release, is a substantive  
16 matter within the province of the legislature. *Samiuddin v. Nothwehr*, 243 Ariz.  
17 204, 404 P.3d 232 (2017) (recognizing the constitution and statutes as the source of  
18 judicial discretion in pretrial release); *See also*, Fradella & Scott-Hayward  
19 *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 Ariz. St. L. J. 845  
20 (2006).

22 In accord with its constitutional authority, the legislature established two  
23 dozen factors (in 15 categories) that courts must consider in determining “the  
24 method of release or the amount of bail,” *i.e.*, factors to consider in deciding the  
25

1 conditions “sufficient” to meet the constitutional policy directives. A.R.S. § 13-  
2 3967(B). The §13-3967 factors are not hierarchical, and the balancing of the  
3 factors in any given case is left to the judge’s discretion.  
4

5 The Petition herein marks the second time in five years that the courts and  
6 AOC have changed or sought to change Arizona’s substantive pretrial release  
7 policy through the Rules of Criminal Procedure.  
8

9 In 2016, AOC proposed amendments, substantially adopted in 2017, that  
10 prohibited the use of offense-based bail schedules, required an “individualized  
11 determination” in bail decisions, and *required the courts to put special focus on*  
12 *affordability in setting a bond*. While the 2017 amendments were all intended<sup>3</sup> to  
13 move Arizona’s criminal justice policy away from money bail, the third was in  
14 direct conflict with the constitution and statutes because it created a special  
15 emphasis on affordability.<sup>4</sup>  
16

17 Affordability has long been among the two dozen factors that courts  
18 consider when setting bail. A.R.S. § 13-3967(B)(7)(“The accused’s family ties,  
19 employment, financial resources, character and mental condition.”). But  
20 affordability carries no special weight among the statutory factors.  
21  
22  
23

---

24 <sup>3</sup> “The amendments adopted by this Court moved Arizona’s criminal justice system away from reliance upon money  
25 bail....” (p. 2, 2021 Petition to Amend)

<sup>4</sup> The statutory scheme already contemplated an individualized determination of pretrial release conditions, and  
arguably precluded the use of bond schedules. Thus, the amendments regarding bail schedules and individualized  
determinations were consistent with the law, regardless of the intention behind them.

1       The 2017 amendment to Rule 7.3 required the trial courts to elevate bond  
2 affordability *above* the other factors the legislature deemed pertinent, and placed it  
3 on par with the broad constitutional concerns of victim and public safety. “A  
4 court's imposition of a monetary condition of release must be based on an  
5 individualized determination of the defendant's risk of non-appearance, risk of  
6 harm to others or the community, *and the defendant's financial circumstances.*  
7 ...and it must not impose a monetary condition that results in unnecessary pretrial  
8 incarceration *solely because the defendant is unable to pay the imposed monetary*  
9 *condition.*” Rule 7.3(c)(2)A), Ariz.R.Crim.P. (emphasis added).

12       Thus “affordability” became the regnant focus, more important than things  
13 like the views of the crime victim, weight of the evidence, drug use, criminal  
14 record, ties to the state, immigration status, or any of the other §13-3967 factors.  
15 And the amendment wasn’t a simple ministerial act necessitated by some new  
16 standard in federal or state constitutional jurisprudence. To the contrary, Arizona  
17 courts have observed that affordability holds no special constitutional rank among  
18 the relevant considerations. *Costa v. Mackey*, 227 Ariz. 565, 569, 261 P.3d 449  
19 (App. 2011)(“ Bail is not deemed excessive, however, simply because the  
20 defendant cannot provide it.”). Instead, the amendment was purely discretionary,  
21 and arose solely because a task force thought it the preferred public policy to have  
22 fewer criminal defendants in pretrial detention.  
23  
24  
25

1        If the 2017 amendment represented a mere incursion into the legislature’s  
2 territory, the amendments originally proposed in this Petition declared all-out war  
3 on the separation of powers. Those since withdrawn proposals included  
4 burdensome processes that doubled down on the problematic affordability  
5 emphasis, created a burden of proof where the legislature had declined to impose  
6 one, and imposed a new duty on counties and municipalities throughout Arizona to  
7 publicly fund legal services that are not constitutionally required. AVCV is  
8 pleased that AOC withdrew these problematic proposals in its Supplement to  
9 Petition. But the Supplement itself raised concerns that future rule proposals will  
10 continue to offend the separation of powers. In the Supplement, AOC noted that  
11 the courts will have meetings with stakeholders for the purpose of identifying  
12 systemic changes that will lead to “eliminating unnecessary pretrial detention due  
13 to the inability to pay secured and cash bonds.”

14  
15        AVCV urges the Court and its administration to recognize that, whatever the  
16 merits of the Task Force’s recommendations, the substantive public policy of  
17 Arizona, as set forth in the constitution and legislative acts, *favors* cash bonds, and  
18 treats affordability as only one among many factors that may be considered in  
19 pretrial release. Continued efforts to “eliminate money for freedom” may be  
20 appropriately made before the legislature and the people, but not through rule  
21 amendments.



### III. VICTIMS' RIGHTS

In addition to creating separation of powers problems, the efforts to implement the Task Force's recommendations through procedural rules is constitutionally infirm because it violates the Arizona Constitution's protections for crime victims.

To "preserve and protect" "justice and due process," foremost among the rights afforded to crime victims by the Arizona Constitution is the right to be treated with "fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process." Conditions of release and bond provisions which surround and enforce them are ways in which the legislature has made these words more than a hollow promise for crime victims. Among other things, the legislature ensured that courts consider the "views of the victim" in release conditions, including it as the first on the list among many factors in the determination of pretrial release conditions. A.R.S. § 13-3967(B)(1).

The 2017 amendment to Rule 7.3 rejected that legislative protection, and elevated affordability to a supreme position, at the expense of the "views of the victim." The amendments originally proposed in this Petition would've been nothing short of abominable to crime victims, transforming a system already

1 known for producing secondary trauma in victims<sup>5678910</sup> into a system with  
2 additional traumatic court appearances, and reduced certainty and finality in  
3 rulings of the courts. And the amendments would've sent an unintended but  
4 dissonant message to crime victims that the courts were firmly determined to get  
5 the victim's offender back on the street.

7 In short, these efforts to change Arizona's public policy, to "eliminate  
8 money for freedom," have given crime victims short shrift. The Arizona  
9 Constitution forbids that short shrift, and instead makes crime victims' interests a  
10 primary concern in the establishment of procedural rules. All rules "governing  
11 criminal procedure and the admissibility of evidence in all criminal proceedings  
12 [must] protect victims' rights." AZ. CONST. art. 2, § 2.1(A)(11). There may be  
13 times when victims' constitutional rights are in tension with defendants'  
14 constitutional rights, and some difficult resolution is required. Not so here. Here,  
15 there are no competing constitutional considerations. Instead, crime victims'  
16 constitutional rights are in tension with the public policy recommendations of an  
17 advisory task force.

---

22 <sup>5</sup> Parsons and Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, Journal of Traumatic  
23 Stress, Vol. 23, No.2.

24 <sup>6</sup> Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, Social Justice Research, Vol. 15, No. 4.

25 <sup>7</sup> Wemmers & Cyr, *What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender  
Mediation*, Applied Psychology in Criminal Justice, 2006, 2(2).

<sup>8</sup> Sales, Baum, and Shore, *Victim Readjustment Following Assault*, Journal of Social Issues, Vol. 40, No.1.

<sup>9</sup> Davies, Devere, and Verbitsky, *Child Maltreatment Victims' Attitudes*, 44 Child & Youth Services Rev. 407 (2014)

<sup>10</sup> Parsons and Bergin, *supra*.

#### 1   **IV.   THE COURT SHOULD NOT CONSIDER THE PETITION**

2           This Petition was filed by the AOC on February 4, 2021, nearly one month  
3 after the deadline for inclusion on this year’s rules agenda. The Court granted  
4 expedited consideration on February 8. Because the Petition did not meet the  
5 standards for expedited consideration set forth in the Court’s rules, the Court  
6 should reconsider its ruling and decline consideration of this Petition on the 2021  
7 Rules Agenda.  
8  
9

10           To be included on the Arizona Supreme Court’s Annual Rules Agenda, a  
11 Petition for Rule Change must be filed on or before the preceding January 10.  
12 Rule 28, Supreme Court Rules. Notwithstanding that deadline, the rules provide  
13 an exception whereby an untimely Petition may be accepted if compelling  
14 circumstances are present. For the exception to apply, the Petition must include a  
15 “request for expedited consideration identifying its reasons.” While the Court may  
16 simply suspend application of Rule 28 in its discretion, its rules require that the  
17 suspension be supported by “good cause shown.” Rule 26, Supreme Court Rules.  
18  
19

20           Here, the Petition presented no compelling circumstances, identified no  
21 reasons for expedited consideration, and presented no good cause justifying a  
22 suspension of the rules. Indeed, relying on five-year-old advisory task force  
23 public policy recommendations, it would have been hard-pressed to meet any of  
24 the above standards.  
25

Respectfully submitted June 4, 2021.  
ARIZONA VOICE FOR CRIME VICTIMS

BY: /s/ Michael G. Bailey  
MICHAEL G. BAILEY